No. 97-1220

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

SAMETH SVAY,

Petitioner,

vs.

CITY OF ATLANTA, *et al.*,

Respondents.

LIEU UY,

Petitioner,

vs.

CITY OF ATLANTA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Supreme Court review is required to clear up confusion among the various circuits regarding the parameters of a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983?

Respondents believe the more focused question is whether testimony provided by a police officer at an adversarial preliminary hearing is protected by absolute immunity.

2. Whether Supreme Court review is required to resolve the issue of whether the intentional or reckless conduct of one police officer is actionable under 42 U.S.C. § 1983 when it causes another officer to use excessive force?

3. Whether an argument that a Code of Silence exists within a police department can be sufficient to support a claim of municipal liability under 42 U.S.C. § 1983?

LIST OF PARTIES

The parties are Petitioner Sameth Svay, Petitioner Lieu Uy, Respondent City of Atlanta in both actions, and Respondents R. L. Ferguson, A. C. Hayes, D. K. Entrekin, W. M. Morlock, W. D. Jackson and M. A. C. Wadley in their individual and official capacities in the case brought by Sameth Svay.

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OPINIONS BELOW

In the case of *Sameth Svay v. City of Atlanta, et al.*, Court of Appeals for the Eleventh Circuit, No. 96-9226, and in the case of *Lieu Uy v. City of Atlanta,* Court of Appeal for the Eleventh Circuit, No. 96-9227, the judgment of the panel for the Eleventh Circuit was per curiam affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a). Judgment of the Court of Appeals for the Eleventh Circuit was entered August 7, 1997.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

While petitioners Sameth Svay and Lieu Uy have pursued the appellate process together, their cases are factually and procedurally distinct even though they arise from the same incident. Respondents prefer to list those facts common to both petitioners, and then address each case separately.

A. Statement of Common Facts

Petitioners set forth fifteen (15) pages of facts. Most of that factual recitation is irrelevant. What follows are the facts relied

upon by the United States District Court for the Northern District of Georgia, and the Court of Appeals for the Eleventh Circuit.

On the evening of May 7, 1993, three plainclothes Atlanta Police Officers — Jackson, Entrekin and Wadley — drove into the parking lot of a predominately Asian apartment complex. The three officers were there ostensibly to serve a search warrant on a suspected Vietnamese gambling game which the officers suspected was run from an apartment in the complex.

While the officers were surveilling the complex, Sameth Svay, along with three other men, armed themselves and walked toward the unmarked police car where officers Jackson and Wadley were located. Officer Entrekin had moved away from the car in order to get a better view of the suspect apartment. The two groups of men confronted each other. It is unclear what communication passed between them, if any. Officer Jackson yelled that one of the men had an AK-47. Gunfire immediately erupted. The district court noted that the facts are in dispute as to who shot first. The court also noted that such a determination is unnecessary and irrelevant.

While shots were being fired, the officers called for help and back-up and described the men involved in the initial confrontation and subsequent on-set of gunfire. Many police officers and sheriff's deputies from many jurisdictions responded to the call for help, among them the Atlanta Police Department Strategic Weapons and Tactical team, (SWAT), and Atlanta Police Officers Ferguson and Hayes.

SAMETH SVAY

A. Statement of Facts

Officers Ferguson and Hayes saw Sameth Svay running across a courtyard between two buildings of the apartment complex. Mr. Svay fit the description of one of the group of men who had fired on officers Jackson and Wadley. Mr. Svay was armed with a

9 mm. handgun. He was challenged by the officers and shot in the left leg as he was attempting to enter an apartment. Officers Ferguson and Hayes did not know who lived in the apartment.

Sameth Svay was arrested and charged with aggravated assault and carrying a concealed weapon. Officer Jackson gave testimony at Mr. Svay's preliminary hearing. After the hearing, Mr. Svay's criminal case was bound over for prosecution. The criminal case against Mr. Svay ultimately was dismissed.

B. Proceedings Below

The district court granted summary judgment in favor of the respondents on all of the petitioner's claims. The court granted summary judgment in favor of the City of Atlanta because the record was devoid of evidence necessary to support a claim of municipal liability under 42 U.S.C. § 1983. The court granted summary judgment in favor of officers Entrekin and Wadley on petitioner's malicious prosecution claim because the petitioner had produced no evidence that would support his claim that they had engaged in the prosecution of his criminal case.

The court granted summary judgment in favor of Officer Jackson on petitioner's malicious prosecution claim because petitioner's claim was premised solely on Officer Jackson's testimony at a preliminary hearing, and because Officer Jackson was entitled to absolute immunity from liability arising from that testimony.

Finally, the court granted summary judgment in favor of officers Entrekin, Jackson and Wadly on petitioner's claim that they intentionally had created a situation in which Sameth Svay would be shot. Petitioner failed to produce any precedent in the Eleventh Circuit that would support a claim of liability where police officers who did not shoot a criminal suspect should be held liable because they created the situation that caused the suspect to be shot. The lack of any Eleventh Circuit precedent led the court to rule that officers Entrekin, Jackson and Wadley were entitled to qualified immunity as to this claim.

The Eleventh Circuit Court of Appeals affirmed the ruling of the district court without comment.

LIEU UY

A. Statement of Facts

After the initial exchange of gunfire between the group of Asian men and officers Jackson and Wadley, a brief lull ensued. During this lull, Lieu Uy pulled into the parking lot of the apartment complex after a day of work as a cook in a Chinese restaurant. An unknown police officer ordered him to stay in his car. He did. When other police officers responded to the scene, Atlanta Police Strategic Weapons and Tactical (SWAT) officers were with them. Unidentified police officers, (apparently SWAT), pulled Lieu Uy from his car and beat him. Mr. Lieu Uy never identified anyone as having beat him.

B. Proceedings Below

Petitioner Lieu Uy listed as defendants John Does 1 - 50. He never identified any of the John Does, nor did he effect service of process upon them. The district court granted summary judgment in favor of the respondent John Does because they had never been identified, nor served. The court granted summary judgment in favor of the City of Atlanta, who was the only remaining defendant, because the petitioner had not shown the existence of a policy, custom or practice of the City of Atlanta Police Department about which the City should have known caused violations of citizens rights and in particular caused a violation of petitioner's rights.

The Court of Appeals for the Eleventh Circuit affirmed without comment.

REASONS FOR DENYING THE WRIT AS TO SAMETH SVAY

I.

PETITIONERS' MALICIOUS PROSECUTION ARGUMENT ACTUALLY CONTESTS THE GRANTING OF ABSOLUTE IMMUNITY FOR TESTIMONY GIVEN AT JUDICIAL PROCEEDINGS; HOWEVER THE SETTLED LAW APPLICABLE TO THIS CASE IS CLEAR THAT THE RESPONDENT POLICE OFFICERS ARE ENTITLED TO ABSOLUTE IMMUNITY.

Petitioner Svay argues that the case of *Albright v. Oliver,* 114 S. Ct. 807 (1994) has led to confusion among the various circuits as to the scope of a cause of action for malicious prosecution under the Fourth Amendment. The thrust of petitioner's argument actually focuses on apparent confusion among the various circuits as to the scope of immunity granted police officers for their testimony given at judicial proceedings. *See Briscoe v. La Hue,* 460 U.S. 325 (1983).

The district court granted summary judgment to the respondents against petitioner's claim of malicious prosecution on the ground that police officers who testify in judicial proceedings are entitled to absolute immunity. The district court based its ruling in part on the authority of *Strength v. Hubert,* 854 F.2d 421 (11th Cir. 1988) which stands for the proposition that police officers are entitled to absolute immunity when they testify at judicial proceedings regardless of the nature of those proceedings.

There exists among the circuits a difference of opinion as to whether the grant of absolute immunity should be limited to testimony given at judicial proceedings that are adversarial in nature, or be allowed to encompass all proceedings that can be classified as judicial.

One of the more recent surveys of how the various circuits treat the extension of absolute immunity to police officers was

provided in *Curtis v. Bembenek*, 48 F.3d 281, 284 (7th Cir. 1995). The results of its survey lead that court to conclude that a

> majority of the circuits have afforded absolute immunity to witnesses, including police officers charged under § 1983 for their allegedly perjurious testimony at various types of pretrial proceedings.

Bembenek, 48 F.3d at 284.

An easy majority of courts extend immunity to witness testimony provided at preliminary hearings. A few circuits have expressed concern over extending immunity to proceedings that are without judicial restraint or cross examination.

The district court in the case *sub judice* found as part of the factual record that during the preliminary hearing, where Officer Jackson is claimed to have provided perjurious testimony, the petitioner had the opportunity to obtain counsel, cross-examine Officer Jackson and present witnesses on his behalf. In other words, the petitioner had the benefit of the same procedural safeguards that he would have enjoyed at trial. When considering the extension of absolute immunity to pretrial proceedings, the Seventh Circuit could find

> no principled basis for distinguishing between the [adversarial] pretrial proceedings and the trial on the merits in determining whether absolute immunity should be granted to a police officer witness.

Curtis v. Bembenek, 48 F.3d at 285; *citing Moore v. McDonald*, 30 F.3d 616, 619 (5th Cir. 1994).

The petition for writ of certiorari should be denied as to this issue because the various circuits are in agreement that where a criminal defendant has the opportunity to obtain counsel, cross-examine police officers giving testimony and call witnesses on his

behalf, the officers giving testimony are entitled to absolute immunity. While there exists a difference among the circuits as to the scope of absolute immunity. That difference is not highlighted by the facts of this case.

II.

POLICE OFFICERS, WHOSE INTENTIONAL OR RECKLESS BEHAVIOR CREATES A SITUATION THAT RESULTS IN OTHER OFFICERS SHOOTING SOMEONE, SHOULD NOT BE EXPOSED TO LIABILITY BECAUSE THE CONSEQUENCE OF THEIR ACTS IS TOO REMOTE AND NOT FORESEEABLE.

The petitioner argues officers Entrekin, Jackson and Wadley should be liable for the fact that he was shot in the leg even though officers Ferguson and Hayes were the officers that fired at him and even though petitioner no longer contends that the actions of Ferguson and Hayes were an excessive use of force. The petitioner claims that the intentional acts of Entrekin, Jackson and Wadley caused the otherwise justifiable shooting.

Initially, the respondents point out that Fourth Amendment analysis cannot apply to petitioner's argument since he was not seized at the time officers Entrekin, Jackson and Wadley committed their allegedly tortious acts. Fourteenth Amendment standards should be applied.

Secondly, the intervening actions of officers Ferguson and Hayes break an already tenuous chain of causation that the petitioner uses to link the actions of Entrekin, Jackson and Wadley to his being shot in the leg. The result is simply not foreseeable.

Respondents can imagine only one scenario that would allow for an assignment of liability under 42 U.S.C. § 1983 and the Fourteenth Amendment — conspiracy among officers Entrekin, Jackson and Wadley to have the petitioner shot by officers such as

Ferguson and Hayes. While such a charge would make for a good suspense novel, the petitioner has never produced any facts that would support such a claim.

III.

PETITIONER'S CLAIM OF A CODE OF SILENCE IS IRRELEVANT SINCE NO UNDERLYING CONSTITUTIONAL VIOLATION EXISTS.

The petitioner has abandoned his argument that the actions of officers Ferguson and Hayes violated his constitutional rights protected under the Fourth Amendment. Without an underlying constitutional violation there can be no basis for municipal liability. Therefore, petitioner's argument that the City of Atlanta should be held liable for tolerating a code of silence within the police department is moot. Moreover, the petitioner has never produced any facts that would suggest that a code of silence exists outside of the parameters of this one particular case.

REASONS FOR DENYING THE WRIT AS TO LIEU UY

Petitioner Lieu Uy was never criminally charged, nor prosecuted for criminal conduct. Therefore, petitioners' argument based upon *Albright v. Oliver* is irrelevant to Petitioner Lieu Uy's claims. Regarding petitioners' second argument that officers Entrekin, Jackson and Wadley should be held liable for the actions of other police officers because they created the situation in which the other officers had to function, respondent City of Atlanta adopts its argument on this issue presented in Svay, *supra.* What remains is petitioners' claim that a code of silence led to the beating suffered by Lieu Uy.

I.

PETITIONER FAILS TO DEMONSTRATE THAT A CODE OF SILENCE EXISTS AS A CUSTOM WITHIN THE ATLANTA POLICE DEPARTMENT AND FAILS TO DEMONSTRATE THAT A CODE OF SILENCE WAS THE MOVING FORCE BEHIND HIS INJURIES.

Assuming *arguendo* that petitioner has produced facts that would tend to show that a "code of silence" operated during the investigation by the Office of Professional Standards, (Internal Affairs), into the claims made by the petitioner that he was beaten by City of Atlanta Police Officers, he has completely failed to establish that a code of silence exists as a custom within the police department. The record is devoid of any fact that would prove such a claim. Moreover, the petitioner has never met his burden of showing that a code of silence, if such a creature exists, is indicative of some inadequacy in the way the Atlanta Police Department either trains, supervises or disciplines its officers, or that such an inadequacy was the moving force behind his beating.

CONCLUSION

In both of the cases presented in the Petition for Writ of Certiorari, the petitioners have asserted arguments that are not supported by the facts, and petitioners' claims against officers Entrekin, Jackson and Wadley are simple overreaching. For all of the foregoing reasons, the respondents request this Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

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